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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK DISNEY MILLER,

Defendant and Appellant.

F067599

(Super. Ct. No. F04100514-9)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jon N. Kapetan, Judge.

Cron Israels & Stark, Philip D. Israels, Sam J. Israels; Caldwell Leslie & Proctor, Michael V. Schafler and Jeffrey M. Chemerinsky for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2005, appellant Patrick Disney Miller pled guilty to a crime “that does not exist under California law,” namely felony possession of diazepam, under Health and Safety Code section 11350, subdivision (a). Possession of diazepam is neither punishable under Health and Safety Code section 11350, subdivision (a) nor as a felony. Instead, it can be punished only as an infraction or misdemeanor under Health and Safety Code section 11375, subdivision (c). In an earlier appeal, *People v. Miller* (2012) 202 Cal.App.4th 1450 (*Miller I*), we held that, although the trial court acted in excess of its jurisdiction, Miller was estopped on public policy grounds from bringing a motion to vacate his plea and modify his conviction. Miller filed a subsequent motion to vacate or set aside his felony conviction because of ineffective assistance of counsel at the time he entered his plea. The motion was denied, and Miller appeals “to remedy the injustice that occurred – and the negative collateral consequences and confusion that will continue to occur – when Mr. Miller unknowingly and without effective assistance of counsel pled guilty to an erroneous charge.”

For reasons that follow, we dismiss the appeal.

PROCEDURAL HISTORY

In order to address Miller’s claims, we first set out the lengthy procedural history of this case.¹

Plea and Sentence

In August of 2004, Miller was charged with two felonies: possession of a controlled substance (diazepam, or Valium) (Health & Saf. Code, § 11350, subd. (a)) and possession of hydrocodone bitrate (Vicodin) (Health & Saf. Code, § 11350, subd. (a)).

¹ The majority of the factual and procedural history set forth below are taken from this court’s opinion in *Miller I, supra*, 202 Cal.App.4th at pages 1453-1455. We also take judicial notice of the record in that case (Evid. Code, § 452).

He was also charged with three misdemeanors: driving under the influence of alcohol or drugs; being under the influence of a controlled substance; and possession of marijuana.

In February of 2005, Miller entered a plea agreement wherein he would plead no contest to felony possession of diazepam and misdemeanor driving under the influence of alcohol or drugs. The remaining counts were dismissed. The terms were set forth in plea form and stated that Miller could receive three years two months in prison, and up to 48 months parole. The plea form stated, inter alia, that registering as a narcotics offender was also a possible consequence of the plea. The trial court found that Miller's plea was freely and voluntarily made and that he understood the nature and consequences thereof.

The probation department recommended formal probation. Defense counsel requested Miller be permitted to attend a specific drug treatment program in lieu of custody time. The trial court found Miller a suitable candidate for probation, suspended imposition of judgment for three years, placed Miller on formal probation for the duration, and ordered him to perform 250 hours of community service in lieu of serving 29 days in custody. Prior to sentencing, Miller was advised of his duty to register as a narcotics offender under Health and Safety Code section 11590; use of the conviction in any later prosecution; disclosure of the conviction in any job application or licensing; and prohibition against possessing any firearms.

In 2006, Miller moved to modify his probation conditions to be less restrictive, due to health concerns. As a result, the trial court eliminated the community service hours requirement.

After successfully completing probation in 2008, Miller petitioned the court to set aside his plea and dismiss the complaint pursuant to Penal Code section 1203.4, subdivision (a).² Included in the petition was acknowledgement that terminating probation would not absolve Miller of his obligation to disclose his conviction in certain

² All further statutory references are to the Penal Code unless otherwise stated.

circumstances and to refrain from possession or controlling a firearm. The trial court granted the petition.

2010 Motion to Vacate Plea and Modify Conviction

In April of 2010, Miller filed a motion titled “MOTION TO VACATE PLEA AND MODIFY CONVICTION,” requesting the court to vacate and set aside his judgment and conviction for unlawful possession of diazepam on the ground that the conviction and judgment were outside the trial court’s subject matter, or fundamental, jurisdiction. The written motion also requested the judgment be modified to reflect a misdemeanor conviction. The trial court agreed that a mistake had been made, but held that since the plea and sentence was an act in excess of jurisdiction, not a lack of subject matter or fundamental jurisdiction, it denied the motion on grounds that equitable estoppel barred Miller from vacating his conviction. As reasoned by the trial court, Miller had received the benefit of his plea bargain in light of the fact that there was another felony available to the People to prosecute him – possession of Vicodin - which had been dismissed as part of the plea.

Miller appealed the trial court’s ruling and, after acknowledging that the trial court had fundamental jurisdiction to accept the plea to the felony charge, argued that the equitable estoppel doctrine applied only where a person is looking to receive a benefit that reduces the direct penal consequence of the judgment and not, as in his case, to eliminate the collateral consequences of the erroneous conviction and plea to a felony (the burden of declaring his prior conviction to potential employers and licensing agencies).

On January 27, 2012, this court agreed that diazepam possession falls under Health and Safety Code section 11375, which specifies the nature of the offense as either an infraction or a misdemeanor, not a felony, but affirmed the trial court’s order, holding that the trial court acted in excess of jurisdiction but, “for reasons of public policy,

[Miller] is estopped from asserting his claim of error to vacate and modify his conviction.” (*Miller I, supra*, 202 Cal.App.4th at p. 1456, fn. 3.)³

2013 Motion to Set Aside, Correct, or Vacate Judgment

On April 15, 2013, Miller filed another motion, this time a “NOTICE OF MOTION TO SET ASIDE, CORRECT, OR VACATE JUDGMENT,” raising the claim that, due to counsel’s ineffective assistance and denial of his due process rights, he made an unknowing and unintelligent entry of a guilty plea to a crime that does not exist. Miller did not make any challenges to the sentencing court’s jurisdiction. In a footnote at the end of the written motion, counsel for Miller states the following: “Although this Motion is filed as a ‘Motion to Set Aside, Correct, or Vacate Judgment,’ the Court may choose [to] deem it a petition for writ of habeas corpus, coram nobis, or audita querela.”

On June 6, 2013, the trial court summarily denied the motion, finding it lacked jurisdiction to consider the merits of the motion via any “procedural vehicles” suggested by Miller. This appeal from the trial court’s order follows.

DISCUSSION

Is the Trial Court’s Order Appealable?

Miller appeals the denial of his motion to vacate his conviction for felony possession of diazepam on several grounds: that the trial court lacked fundamental jurisdiction to enter the conviction; that, in the alternative, the trial court acted in excess of jurisdiction; and that he received ineffective assistance of counsel because he was not appropriately advised that possession of diazepam was at worst a misdemeanor and not punishable under the statute he was charged with, and therefore, he was not aware of the important aspects of the nature and consequences of his plea. As discussed, below, we find the order from which Miller appeals nonappealable.

³ Miller filed a timely petition for writ of certiorari with the United States Supreme Court. The United States Supreme Court denied review on January 14, 2013.

A criminal defendant may appeal from ““a final judgment of conviction”” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980 (*Gallardo*); §§ 1237, subd. (a), 1466, subd. (b)(1)), or from an ““order made after judgment, affecting the substantial rights of the party.”” (*Gallardo, supra*, at p. 980; §§ 1237, subd. (b), 1466, subd. (b)(2).) An order denying a motion to vacate a judgment would seem to qualify as an “order made after judgment, affecting the substantial rights of the party.” (§§ 1237, subd. (b), 1466, subd. (b)(2); see *Gallardo, supra*, at p. 980.) However, it is firmly established that such an order is not appealable “when the appeal would merely bypass or duplicate appeal from the judgment itself.” (*Gallardo, supra*, at p. 981; accord, *People v. Totari* (2002) 28 Cal.4th 876, 882; *People v. Thomas* (1959) 52 Cal.2d 521, 527.) “Ordinarily no appeal lies from an order denying a motion to vacate judgment of conviction on a ground which could have been reviewed on appeal from the judgment.” (*People v. Thomas, supra*, at p. 527.) “In such a situation ... allowance of an appeal from the order denying the motion to vacate would virtually give the defendant two appeals from the same ruling and, since there is no time limit[] within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment.” (*Ibid.*)

There is a limited exception, however, to this non-appealability rule when a motion to vacate challenges the trial court’s jurisdiction. (*People v. Thomas, supra*, 52 Cal.2d at p. 529.) “[J]urisdictional errors can be of two types. A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment voidable. [Citations].” (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) The denial of a motion to vacate in these situations is appealable. But, where it is clear after review of the entire record and full consideration of the issues that the underlying motion raised no fundamental jurisdictional defect, that the judgment is not void on its face, and that the errors, if any, are not such as to render the judgment

void, “the appeal from the order denying motion to modify is unauthorized and must be dismissed.” (*People v. Cantrell* (1961) 197 Cal.App.2d 40, 45.)

Miller contends his conviction is void and the motion to vacate therefore appealable because the plea court lacked subject matter or fundamental jurisdiction. As outlined above, Miller made this same argument in the trial court in his 2010 motion to vacate, but on appeal from denial of that issue and motion, admitted that the trial court had fundamental jurisdiction to accept the felony plea. In the alternative, he also argues that, if this court finds that the trial court acted in excess of jurisdiction, we should review whether the estoppel doctrine bars his challenge in light of his new ineffective assistance of counsel claims.

As we determined in *Miller I*, the trial court acted in excess of jurisdiction, but, for reasons of public policy, Miller was estopped from bringing a motion to vacate his plea and modify his conviction. (*Miller I, supra*, 202 Cal.App.4th at pp. 1453, 1456.) In doing so, we implicitly found that the plea court did not lack fundamental jurisdiction, although that issue was not raised by Miller in that appeal—in fact, fundamental jurisdiction was admitted by Miller in his briefing. The issues of jurisdiction Miller now raises – whether the trial court lacked fundamental jurisdiction or acted in excess of jurisdiction – are no different from issues raised and decided in Miller’s 2010 motion to vacate. Miller had a chance to fully present his case when his first motion to vacate was litigated in 2010, but chose to appeal only on the grounds of excess of jurisdiction in subsequent appeal. Thus, the trial court’s order is not appealable on the jurisdictional grounds Miller now asserts because both the fundamental and excess jurisdictional issues have already been decided against Miller and collateral estoppel bars relitigation of those issues. (*People v. Vogel* (2007) 148 Cal.App.4th 131, 136 [collateral estoppel bars relitigation if issue decided at previous trial identical to one relitigated; if previous trial resulted in final judgment on the merits; and if party against whom collateral estoppel is asserted was party at prior trial].)

We also find Miller's remaining claim of ineffective assistance of counsel nonappealable. Miller alleges that counsel failed to accurately ascertain the nature and consequences of the charges against him, rendering counsel's performance far below an objective standard of reasonableness. In the trial court, Miller argued that, in order to address this issue, his motion to vacate might be deemed writs of habeas corpus, of error *coram nobis*, or *audita querela*. We find none available to him.

A party, such as Miller, who is no longer in constructive custody may not challenge his conviction on the ground that he was deprived of effective assistance of counsel by way of habeas corpus. (See, e.g., *People v. Villa* (2009) 45 Cal.4th 1063, 1071-1072 [no longer in custody, no writ can be issued].)

Neither has Miller stated a valid ground for *coram nobis* relief. In California, “[an] attack on a judgment by motion to vacate it is in legal effect a proceeding for a writ of error *coram nobis*, whether it be called by that name or not.” (*People v. Mason* (1958) 163 Cal.App.2d 630, 632.” (*People v. Dowding* (1960) 185 Cal.App.2d 274, 276.) Furthermore, “a nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for a writ of error *coram nobis*.” (*People v. Kim* (2009) 45 Cal.4th 1078, 1096.) However, a writ of *coram nobis* will not issue to vacate a plea of guilty where, as here, the claim is that the defendant did not receive effective assistance of counsel. (*Gallardo, supra*, 77 Cal.App.4th at pp. 982-983.)

And finally, although only an argument raised below and not repeated on appeal, Miller cites no California authority, and we have found none, justifying treatment of his claim as a petition for the common law writ of *audita querela*. It is doubtful that the writ exists in California. (See *Arechiga v. Housing Authority of Los Angeles* (1958) 159 Cal.App.2d 657, 660 [*audita querela* does not exist in California civil cases, its function having been preempted by certain section of the Code of Civil Procedure].) In any event, the writ serves as a means of attacking a judgment that was correct at the time it was rendered, but is rendered infirm by matters arising after its rendition. (See *People v.*

Vasilyan (2009) 174 Cal.App.4th 443, 457, fn. 2 (dis. opn. of O’Neill, J.).) Miller does not argue that his conviction was correct at the time of his guilty plea, and therefore the writ would not issue.

For all of the reasons expressed above, the appeal is dismissed.

DISPOSITION

The appeal is dismissed.

FRANSON, J.

WE CONCUR:

GOMES, Acting P. J.

POOCHIGIAN, J.